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No. 02-1624

IN THE

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT AND
DAVID W. GORDON, SUPERINTENDENT,
Petitioners,

v.

MICHAEL A. NEWDOW *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF THE COUNCIL FOR SECULAR HUMANISM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT MICHAEL A. NEWDOW

EDWARD TABASH *
LAW OFFICE OF EDWARD TABASH
8484 Wilshire Boulevard, #850
Beverly Hills, CA 90211
(323) 655-7506

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether a public school's policy of requiring teachers, at any time during the school day, to lead students in an affirmation that this nation is "under God" violates the Establishment Clause of the First Amendment.

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BRIEF OF THE COUNCIL FOR SECULAR HUMANISM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT MICHAEL A. NEWDOW

INTEREST OF THE *AMICUS CURIAE*

The Council for Secular Humanism (hereinafter "Council") is a non-profit educational organization based in Amherst, New York, with affiliates all over the country and the world. The Council is the largest organization in the world representing the interests of nonbelievers.[1]

[1] This brief is filed with the consent of the parties, and letters evidencing such consent have been filed with the Court. Pursuant to Rule 37.6, *Amicus* certifies that no counsel for a party authored this brief in whole or in part and that no person or party other than the *Amicus* or its counsel has made a monetary contribution to this brief's preparation or submission.

The growth of the Council reflects just one aspect of the increasing diversity of religious and nonreligious beliefs in this country. There are many Americans, in addition to atheists, who do not believe in the deity of monotheism. There are Buddhists and Taoists who have no single supreme being. There are Hindus who believe in a pantheon of deities. There are Muslims who may not want to pledge allegiance to any political unit that is declared to be under a Biblical as opposed to a Quranic God. Public school ceremonies and recitations that endorse monotheism by mandating an affirmation that our nation is "under God" relegate all these Americans to second-class citizenship.

It is the view of the Council that government must be neutral in matters pertaining to religion. Government must not prescribe or endorse any particular religious position. The Council would oppose any effort to require schoolchildren to affirm that this is "one nation under no God" as vigorously as it opposes the mandatory recitation of the current Pledge. The Pledge should be restored to its prior condition so it is inclusive of all Americans, whether they be monotheists, polytheists, or atheists.

SUMMARY OF ARGUMENT

This Supreme Court has most recently held in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) that no branch of government may communicate the message to anyone that because of either accepting or rejecting any religious belief "they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 309-310, quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

The Pledge of Allegiance should simply stay out of the God business. The government by falling silent on the question of God, should now convey to all Americans that we are

all equal members of the political community, regardless of whether we acknowledge any deity or not.

For the government to officially affix the words "under God" as an integral component of our nation's primary verbal patriotic exercise, is for the government to precisely communicate "outsider" status to the nonbeliever or to the adherent of a religious belief system in which belief in a monotheistic deity is rejected.

Impressionable and vulnerable school children should not be put by the public school system in a position in which such children would have to exercise enormous courage in excusing themselves from participating in the recitation of words that may very well violate the conscience of their families. It should not be the function of government to put children into a coercive environment in which they would face intense peer pressures to conform to the common practice of most others, when the issue is one of acknowledgment of God.

The Council also maintains that it is impermissible for the government to convey the impression that any American's patriotism is of a more desirable pedigree if that patriotism is intertwined with belief in a God. Nothing would be more contrary to the goal of avoiding religious strife, and more destructive of the objective of preserving a society in which the believer and nonbeliever are officially equal, than for the government to be able to formally convey the impression that the patriotism of the believer is more welcomed in American society than the patriotism of the nonbeliever.

If this Court were to uphold public school recitations of the Pledge, with the inclusion of the words "under God," then this Court will have to address exactly what, if any, are the rights that believers have in our country that nonbelievers don't have. This could open the door to horrendous civil strife. If the government can in any way favor the believer more than the nonbeliever, there is then the ominous shadow

of shunting the nonbeliever off into second-class citizenship, which, itself, would signify the onset of religious tyranny.

The Council thus asks this Honorable Supreme Court to uphold the decision of the Ninth Circuit that properly recognized the unconstitutionality of any reference to God in formal recitations of the Pledge in our nation's public schools.

ARGUMENT

I. NO BRANCH OF GOVERNMENT CAN FAVOR THE BELIEVER OVER THE NONBELIEVER

This Court has always required government bodies, at all levels, to refrain from betraying any favoritism toward belief over nonbelief and from betraying any favoritism toward believers over nonbelievers. One of the best expressions of this consistent view of this Court is:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.

Epperson v. Arkansas, 393 U.S. 97, 103-104 (1968).

The language in this quote from *Epperson* requires strict government neutrality in matters of religion. The concept of God is a religious theory. For the government to declare, in its officially prescribed set of words designed for patriotic expression, that we are a nation under a deity, is to violate the prohibition against favoring religion over nonreligion.

As Justice Souter pointed out in his thorough concurring opinion in *Lee v. Weisman*, 505 U.S. 577 (1992), the Framers of the Bill of Rights, the Congress in 1789, repeatedly considered and rejected language that would allow government to aid all religions, even if no preference or favoritism was shown to any one over any other. Rather, the Framers of the First Amendment intended to prohibit government support or favoritism for religion, in general. As Justice Souter points out, James Madison, the initial principal author of the First Amendment, had only a few years earlier collaborated with Thomas Jefferson in the composition of the Virginia Statute for Religious Freedom, in which all non-preferential aid to religion, in general, was rejected. 505 U.S. at 615.

The version of the First Amendment that emerged from the House was that Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed. 505 U.S. at 613. However, what finally emerged in September of 1789, after a joint conference between the House and Senate, was the actual language, now in force, that there shall be no law "respecting an establishment of religion." 505 U.S. at 614. Justice Souter comments that it is remarkable that the final language rejected all earlier language that only prohibited laws establishing a national religion. *Id.* The final language prohibits all laws that even respect any establishment of religion.

To say that "under God" is not a religious expression is to violate all common understandings of the use of language. The insertion of the phrase into the Pledge in 1954 was done with the explicit purpose of tying our society to God, primarily as a way of distinguishing ourselves from Soviet communism. For Congress and the president to have deliberately altered the Pledge to formally seek refuge in God is nothing other than a religious undertaking. There is no such

thing as a secular invocation of God, or an invocation of God that is supposed to lack all spiritual purpose and meaning. Why even insert the phrase "under God" in the Pledge if it is meant to be an empty set of words, devoid of any meaning? Thus, in 1954, the government acted with a theological intent when it inserted these words into the Pledge. As has already been shown and as will be demonstrated throughout this Brief, the non-preferential aspect of the phrase does not save it from being unconstitutional, because government cannot even generically favor theism over nonbelief. As this Court has repeatedly said:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to "profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers.

Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

To formally insert "under God" in the Pledge is to violate the clear holding of *Torcaso* by aiding all religions against nonbelievers.

Under our constitutional system, it is up to individuals to determine for themselves if our nation is to be deemed to exist under the jurisdiction and control of a supernatural being or not. It is not the business of government to betray a preference for the viewpoint that our nation is under the aegis of such a being. Government is supposed to be silent on the question of whether we are under God or not. Though *Amicus* is an atheistic organization, *Amicus* would just as fervently oppose any phrase, formally inserted into the Pledge by any branch of government, explicitly stating that our nation is not under God. We want government to be silent on this point in order to ensure that neither believers nor nonbelievers will be favored, one over the other. We want

government to represent believers and nonbelievers equally. Government best accomplishes this by staying out of the God business altogether.

Much has been made by the opposing side in this case of the supposed constitutionality of government's rights to acknowledge the religious heritage of the American people. This is used to then justify the right of government to affirmatively promote a theological premise, that is, that God exists. There is a rational way to handle this. Schools can teach about religion and can teach about the role of religion in American life, as historical accounts of what people believed at various stages in our history. However, this does not mean that public schools are permitted to impart the view that God does in fact exist. The phrase "under God" in the Pledge does not just acknowledge a religious heritage of historical significance. It affirmatively asserts that there is a God. This the First Amendment forbids, because it is not the business of government to officially declare that God does or does not exist.

The above quoted language from *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309-310, that no branch of government may ever communicate to anyone that because of either accepting or rejecting any religious belief, they are outsiders and not full members of the political community, is thoroughly contravened if the government's official Pledge of Allegiance asserts that the nation is definitely under God. This automatically makes the nonbeliever an outsider and communicates to the nonbeliever, or other religious dissenter, that the government views correct patriotism as only one that contains within it an acknowledgment of God.

It has also been argued repeatedly by those who support retaining the phrase "under God" in the Pledge that the Establishment Clause, while prohibiting government bodies from composing sectarian affirmations, allows some kind of vague, watered down, nonsectarian, civic acknowledgment of

an equally vague, watered down, nonsectarian, civic God. However, this Court addressed precisely this issue in *Lee v. Weisman*, by stating:

> That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors.

505 U.S. at 594.

An example of how the phrase "under God" is an unconstitutional component of the Pledge can be readily seen by contemplating its opposite. If the Pledge were formally amended by Congress to explicitly assert that we are "one nation under no God," this would obviously be unconstitutional because it would mean that government is officially expressing a view as to whether or not there is a God. Accordingly, *if it would be unconstitutional for the Pledge to explicitly state that we are one nation under no God, it is equally unconstitutional for the Pledge to state that we are one nation under God. To uphold the latter is to allow government to engage in the forbidden act of favoring believers over nonbelievers.*

It would also be unconstitutional to force even those few children, who had the courage to exercise their opt out rights from reciting the Pledge, to still join in its recitation. It is beyond dispute that for a public school to force an unwilling child to say the words, "under God," even despite that child's expressed protests, would be a clear violation of the Establishment Clause. Thus, the phrase is not empty. It is not devoid of meaning. It is a clear pronouncement from the government that our nation is under a deity.

II. SINCE NO BRANCH OF GOVERNMENT CAN FAVOR THE BELIEVER OVER THE NON-BELIEVER, THE PUBLIC SCHOOLS CANNOT FORMALLY LEAD RECITATIONS OF THE PLEDGE THAT CONTAIN "UNDER GOD"

The above section has demonstrated that no branch of government can favor the believer over the nonbeliever and that no branch of government may communicate to non-believers that they are less a part of the political community than believers. It therefore follows that no branch of government can formally lead the recitation of the Pledge with the words "under God," because to do so would be to favor the believer over the nonbeliever and to communicate to nonbelievers that they are less a part of the political community than believers.

Again, there is a difference between acknowledging the religious heritage of many Americans and asserting that our nation is, indeed, under a deity. To the extent that acknowledging any religious heritage means that government will side with those who believe in God, against those who don't, government has then violated the First Amendment. This Court has repeatedly held that no branch of government can "aid one religion, aid all religions, or prefer one religion to another." *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 15 (1947). For government bodies tc formally lead recitation of the Pledge, with the words "under God," is to aid all religions, that is, to aid all monotheistic religions. Thus, the Establishment Clause is violated.

Government actions that favor religious believers over nonbelievers are unconstitutional. *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring). Petitioners must be challenged to explain how the inclusion of the words "under God" in the Pledge does not constitute a government action that favors belief over nonbelief. The First Amendment requires government to pursue a course of

neutrality toward religion. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 792-793 (1973).

If the Pledge contained the words: "One nation, under no God," it would not do to claim that the Pledge was only trying to affirm government neutrality in matters of religion or that it was only trying to recognize the heritage of religious liberty in our nation's history, in which people were and are equally free to not believe. Thus, *if government neutrality in matters of religion, and the edict that government cannot pick favorites between belief and nonbelief, would be violated by inserting the phrase, "under no God," in the Pledge; such a violation must also result from having the phrase, "under God," in the Pledge.*

It can now be plainly seen that a clear violation of the required government neutrality in matters of religion occurs every time a public school teacher formally leads students in the Pledge, with recitation of the words "under God."

III. THE NOTION OF "WILLING" SCHOOL CHILDREN, WHEN IT COMES TO TEACHER-LED RECITATIONS OF THE PLEDGE IN PUBLIC SCHOOLS, IS A SHAM THAT LEADS TO COERCION. IMPRESSIONABLE, VULNERABLE SCHOOL CHILDREN CANNOT BE EXPECTED TO PUBLICLY DISTANCE THEMSELVES FROM THEIR PEERS BY ASSERTING A REFUSAL TO PARTICIPATE IN THE PLEDGE ON GROUNDS OF THEIR FAMILY'S CONSCIENCE OR DISSENT

Amicus respectfully insists that all those who have represented, and who will represent, to this Court that school children, whose families are nonbelievers or religious dissenters, can always excuse themselves from participating in the Pledge, are really promoting a sham.

Common experience and common sense tell us that the hardest thing in the world for six year olds to do is to stand up and openly differentiate themselves from all the other children, by asking to be excused from reciting the Pledge. It is absolutely false to think that young children will be able to muster up the courage to separate themselves from all the others. It is also not the business of the public schools to put young children to the test of whether or not they have the courage to run the gauntlet of peer pressure and disapproval by displaying extraordinary courage on matters of principle, in front of the whole class.

In *Lee v. Weisman*, this Court recognized that adolescents are susceptible to pressure from their peers toward conformity, and that the influence is strongest in matters of social convention. 505 U.S. at 593. If this is true for adolescents, it is even more true for younger children, who have even less ability to withstand social pressures for conformity. In *Lee*, this Court recognized that Establishment Clause concerns are heightened when it comes to protecting freedom of conscience from subtle coercive pressures in elementary and secondary public schools. 505 U.S. at 592.

The phrase "under God" is an acknowledgment that the nation is under a deity. It is an acknowledgment of God as much as is a prayer, and is thus, for all practical purposes, a prayer. It is definitely a religious exercise. No one has ever demonstrated how invoking God's name can be a secular undertaking. In *Lee*, this Court held unconstitutional even nonsectarian prayers, formally commissioned by the public school system, at high school graduation ceremonies. For a branch of government to formally lead elementary school children in the recitation of an affirmation that contains within it the phrase "under God," is as much, if not more, of a coercive practice than for high school

graduates to hear a prayer, recited by someone else, at their graduation ceremony.

> What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

Lee v. Weisman, 505 U.S. at 592.

In *Lee*, this Court recognized that even indirect coercion in matters of religion in the public schools is unconstitutional. *Id.* Even though the concern over indirect coercion is not limited to the public schools, that concern is most pronounced where public schools are involved. *Id.*

In *Lee*, this Court also said that the Establishment Clause prohibits placing primary and secondary school children in the position of either participating in or protesting objectionable prayer exercises. 505 U.S. at 593. To the extent that the formal school sponsored recitation of the Pledge with the words "under God" is a prayer or religious exercise, or is the functional equivalent of a prayer or religious exercise, this Court's holding in *Lee* requires that the phrase "under God" be stricken from any such public school recitation.

It has been argued that this Court's upholding of non-sectarian prayers to open legislative sessions in legislative bodies, in *Marsh v. Chambers*, 463 U.S. 783, 793-794 (1983), covers the formal recitation of the Pledge, with the phrase "under God," in our public schools. However, this Court, in *Lee*, recognized the vast difference, in terms of coercion, between prayers offered in a setting in which adult legislators are free to come and go, and have the autonomy of adults holding powerful elective office, and children constrained to either participate in rituals or draw attention to themselves in order to avoid participation. 505 U.S. at 597-598.

In *Lee*, this Court held that even subtle coercive pressures, in a public school setting, to participate in any kind of religious ritual, are unconstitutional. 505 U.S. at 588. Public school teachers who formally lead children in the Pledge, containing the "under God" phrase, create overt, let alone subtle, coercive pressures to conform. The younger the child, the more difficult it is to resist the pressure to conform.

This Court has historically always recognized the extreme threat that any patriotic exercise, coerced by the public schools, presents to the legitimate liberty interests of children:

> All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 635 n. 15 (1943), quoting Cushman, *Constitutional Law in 1939-40*, 35 American Political Science Review 250, 271 (1941).

Justice Goldberg, concurring in *School Dist. of Abington Tp., v. Schempp*, 374 U.S. 203 (1963), stated that a religious exercise in the public schools violates the First Amendment if they affect "young impressionable children whose school attendance is statutorily compelled," and if such an exercise utilizes "the prestige, power, and influence of school administration, staff, and authority." 374 U.S. at 307 (Goldberg, J., concurring). This pronouncement by Justice Goldberg was formally adopted by the majority opinion in *Lee*. 505 U.S. at 592. Certainly, this kind of coercion is exactly what happens when young, impressionable children are confronted by a situation in which the key authority figure in the classroom, the teacher, is formally leading the recitation of the Pledge with the words "under God."

Unlike even the words "In God We Trust" on our nation's money, the Pledge ominously requires public verbal recitation. It is designed by government to indoctrinate school children with the meaning of its words. In its current form, it is intended by government to indoctrinate children to believe that our nation is under God. The Establishment Clause prohibits government from using its awesome power, coupled with the real-world peer pressure that children will face, in order to compel the belief that the nation is under a deity.

The notion of some kind of watered down "ceremonial deism" that somehow bypasses the clear prohibitions of the Establishment Clause, fails miserably when confronted with the coercive realities of the "under God" portion of the Pledge in the public schools.

Justice Kennedy warned in his concurring opinion in *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), that the inquiry into whether or not a public school has coerced participation in any religious activity "must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw." 496 U.S. at 261-262 (Kennedy, J., concurring). This pronouncement by Justice Kennedy was formally adopted by the majority opinion in *Lee*. 505 U.S. at 592. If special concern is necessary to prevent coercion at the secondary level, it is even more required at the elementary school level, where the children are much more vulnerable and impressionable and where much of the recitation of the Pledge occurs in our country. It is simply too precarious a task to ensure that elementary school children are reciting the "under God" portion of the Pledge in a fully voluntary manner, without any hint of coercion or felt peer pressure. Thus the phrase "under God" must be stricken from the Pledge, as it is recited in the nation's public schools.

The clear precedents of this Court, and common sense and experience, all compel the conclusion that the formal inclusion of the phrase "under God" in the Pledge, as officially recited in the public primary and secondary schools of our nation, constitutes impermissible coercion of school children to participate in acknowledging that our nation is under a deity.

IV. IT IS COERCIVE AND EXCLUSIONARY, TO THE DETRIMENT OF NONBELIEVERS AND OTHER RELIGIOUS DISSENTERS, FOR GOVERNMENT TO OFFICIALLY CONVEY THE MESSAGE THAT PATRIOTISM, COMBINED WITH BELIEF IN GOD, IS SUPERIOR TO PATRIOTISM THAT IS SILENT AS TO ANY DEITY

As has already been expressed in this Brief, this Court currently holds that no branch of government may communicate the message to anyone that because of either accepting or rejecting any religious belief, "they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. at 309-310, quoting *Lynch v. Donnelly*, 465 U. S. 668, 688 (1984) (O'Connor, J., concurring).

For government to communicate to the nation's school children, by its officially prescribed mode of verbally affirming patriotism, that such an affirmation of patriotism is preferred if it acknowledges that our nation is under God, rather than not, is to precisely communicate the message to nonbelievers and religious dissenters that they are outsiders.

As this Court said in another case involving the Pledge of Allegiance, even before the phrase "under God" was included in it:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 at 642.

For the government to have inserted the phrase "under God" in the Pledge is for the government to prescribe what shall be orthodox in politics, nationalism, and religion, in violation of the holding in *Barnette*. The government is saying that the "official" view of the United States is that it is a nation under God. The First Amendment does not allow the Government to do this, particularly in the coercive environment of the public schools.

Patriotic fervor is always at a fever pitch, particularly in times like the present, when there is a pervasive sense of danger to our national security. In a post September 11, 2001 climate, nerves are raw and the scope of tolerance for dissenters is, at best, doubtful. By intertwining recognition of God with patriotism, by the official inclusion of "under God" in the Pledge, the government is communicating to the American people, particularly impressionable school children, that the only officially acceptable expression of patriotism is one that recognizes God's hegemony over the nation. The government cannot pronounce outsider status on the nonbeliever for not considering the nation to be under God. The government cannot, without violating the holding in *Barnette*, formally set forth a patriotic affirmation that mixes acknowledgment of God with allegiance to the nation. All the problems inherent in such government combining of patriotism and God are dangerously intensified in the context of indoctrinating young children in our public schools.

This Court has:

> unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects or even intolerance among "religions" to encompass intolerance of the disbeliever and the uncertain.

Wallace v. Jaffree, 472 U.S. 38, 53-54 (1985).

For the government to include "under God" in the official Pledge of Allegiance is for the government to be derelict in its duty to forestall intolerance against nonbelievers. The inclusion of "under God" in the government-composed Pledge of Allegiance serves only to promote hostility toward the nonbeliever or religious dissenter. In the public school system, there is the overwhelming danger that it will indoctrinate young children to grow up intolerant of nonbelievers and other religious dissenters.

The Council is concerned that there is an ever growing trend in our nation toward widespread prejudice and unjustified animosity toward nonbelievers and other religious dissenters. The more government places its imprimatur on belief in God, the more inhospitable our entire culture becomes toward those who hold different views. The Council wishes to secure a continued consistent interpretation of the First Amendment so that government never becomes a catalyst in fomenting even the slightest degree of intolerance toward nonbelievers or other religious viewpoint minorities.

No branch of government can "treat people differently based on the God or gods they worship, or do not worship."

Board of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring). For the government to formally include the words "under God" in the Pledge is to treat nonbelievers differently. It is to communicate to them and to society-at-large that the nonbelievers' patriotism is incorrect insofar as that patriotism fails to acknowledge that our nation is under a deity. Government can never take sides in the debate over whether or not there is a God. Government can never declare there to be a God. Government cannot confer outsider status on nonbelievers or religious dissenters by officially adopting a recitation of patriotic allegiance that explicitly places our nation under God. Government is not permitted to indoctrinate our nation's school children with the view that patriotism is defective or incomplete, unless accompanied by a belief in God.

V. IF THIS COURT UPHOLDS THE "UNDER GOD" PHRASE IN THE PLEDGE, THIS COURT WILL THEN HAVE TO DEFINE THE EXACT PARAMETERS OF THE EXTENT TO WHICH GOVERNMENT CAN FAVOR BELIEVERS OVER NONBELIEVERS

Throughout this Brief, *Amicus* has clearly shown that this Court, by its own words, insists on a society in which the believer and nonbeliever are equal before the law and before any and all branches of government. If this Court upholds the words "under God" in the Pledge, in the coercive environment of dealing with young children in the public schools, the Court will then have to hand down precise guidelines for society, delineating where government can favor belief over nonbelief and where government cannot do so. This would be a painstaking task that requires the most minute analysis of every facet of all government actions that touch upon God or religion. It would be much more consistent with this Court's own line of reasoning to affirm the 9th Circuit and to recognize that the phrase "under God" has no place in any

government-composed recitation, and has no place in any recitation formally led by any public school official or teacher.

If this Court allows the government to insert the explicit affirmation that our country is under God, into our nation's formal declaration of patriotism, in what other ways will the government now be permitted to favor belief over nonbelief? Will any of these now permitted expressions of government favoritism for belief over nonbelief cause the nonbeliever to fall into second class citizenship? If so, wouldn't second-class citizenship for anyone, just because of not believing in any God, violate everything the First Amendment stands for? This Court has said that: "No person can be punished for entertaining or professing religious beliefs or disbeliefs." *Everson v. Board of Education of Ewing Tp.*, 330 U.S. at 15-16.

The clear objective of the First Amendment, as has been explicitly affirmed by this Court since 1947, is the preservation of a society in which no branch of government can confer any greater benefits on anyone because of that individual's views on matters of religion. Accordingly, no branch of government can ever impose penalties on someone because that individual is either a believer or nonbeliever. For instance, this Court has held that government cannot put restrictions on how nonbelievers can criticize religion, but not apply those same restrictions to how religious believers can criticize nonbelievers, *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 391-392 (1992).

This Court has held that government cannot "place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989). As has already been pointed out in this Brief, it is most coercive for school children to be formally led by school officials in the recitation of the Pledge, containing the words, "under God,"

even though there is a *pro forma* right of a child to opt out of joining in the recitation. Further, if government cannot place any of its authority behind religious belief in general, then government cannot officially adopt, as it did in 1954, a Pledge amended to contain the words "under God." Government is prohibited from undertaking any course of action that marginalizes or isolates the nonbeliever.

The fact that a majority of Americans may favor the words "under God" in the Pledge does not confer on that majority a constitutional right to have the Pledge reflect such an affirmation of God. The prohibition against government favoritism for religion, like all other provisions of the First Amendment, are not dependent upon the will of even an overwhelming majority of people. This Court has said:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities. . . . One's right to . . . free speech . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. at 638.

The government cannot allow majority religious sentiment to override the otherwise required neutrality in matters of religion.

The First Amendment has a deep purpose of requiring government neutrality in all matters of religion, so as to not only preserve equal rights for both believers and nonbelievers, but also to prevent the kind of internal strife that historically occurred within countries whenever the government was permitted to promote religion. As this Court has said:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a

> fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.

School Dist. of Abington Tp., v. Schempp, 374 U.S. at 222.

On what underlying, cohesive theory could a consistent constitutional doctrine be developed that would allow the government to openly promote the idea, to our nation's school children, that the nation is under God, as opposed to remaining silent on the point; and, yet not otherwise betray favoritism for the believer over the nonbeliever? None exists. Rather than trying to cobble together such an inherently internally inconsistent theory, the highest fidelity to the Constitution would be maintained by upholding the Ninth Circuit and by reaffirming the proper constitutional principle that no branch of government, in any circumstances, can betray favoritism for the believer over the nonbeliever. Such a reaffirmation entails compelling government to refrain from officially indoctrinating school children with the belief that the nation exists under God.

A Pledge of Allegiance that includes the phrase, "under God," excludes many Americans. A Pledge of Allegiance that is simply silent on God, leaving the question of a deity up to each individual, includes all Americans.

CONCLUSION

Based on the foregoing, it is respectfully requested that this Court affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted.

EDWARD TABASH *
LAW OFFICE OF EDWARD TABASH
8484 Wilshire Boulevard, #850
Beverly Hills, CA 90211
(323) 655-7506

* Counsel of Record

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